

State Constitutional Law - Milwaukee Parental Choice Program Upheld: *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992)

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NOTES

STATE CONSTITUTIONAL LAW—Milwaukee Parental Choice Program Upheld. *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

I. INTRODUCTION

The concept of providing public financial aid to allow parents the choice to educate their children in private schools dates to the eighteenth century when it was advocated by Adam Smith,¹ Thomas Jefferson,² and Thomas Paine.³ This concept became policy with the enactment of the Milwaukee Parental Choice Program (MPCP) in April 1990.⁴ The MPCP allows a limited number of Milwaukee students⁵ whose families meet low income requirements⁶ to enroll in nonsectarian private schools⁷ that receive approximately \$2,500 per pupil.⁸

In *Davis v. Grover*,⁹ the Wisconsin Supreme Court held that the Milwaukee Parental Choice Program did not violate the three provisions of the

1. DAVID W. KIRKPATRICK, CHOICE IN SCHOOLING 25-31 (1990); see also Shawn T. Newman, Note, *Education Vouchers and Tuition Tax Credits: In Search of Viable Public Aid to Private Education*, 10 J. LEGIS. 178, 180 & n.16 (1983).

2. KIRKPATRICK, *supra* note 1, at 34.

3. *Id.*; see also E.G. West, *Tom Paine's Voucher Scheme for Public Education*, 33 S. ECON. J. 378 (1967) (Paine proposed that state governments pay poor families to educate their children under fourteen years old); Newman, *supra* note 1, at 180 & n.15.

4. WIS. STAT. § 119.23 (1989-90).

5. No more than 1% of the school district's membership may attend choice schools in any school year. WIS. STAT. § 119.23(2)(b)(1) (1989-90). Because the MPCP currently applies only to Milwaukee, it has a maximum enrollment of about 1000 students. At the end of the 1990-1991 school year, 249 students were enrolled in the MPCP. Eighty-six of these students did not return to the MPCP at the beginning of the 1991-1992 school year when the program had 534 pupils in 6 participating schools. Priscilla Ahlgren, *Scores Aren't Up Under School Choice*, MILWAUKEE J., Nov. 21, 1991, at A1.

6. An eligible pupil's family income may not exceed 175% of the federal poverty level. WIS. STAT. § 119.23(2)(a) (1989-90).

7. WIS. STAT. § 119.23(2)(a) (1989-90). The United States Supreme Court has often declared state aid plans benefitting parochial schools unconstitutional under the First Amendment. Ronald D. Rotunda, *The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools*, 65 N.C. L. REV. 917, 929-30 (1987); see, e.g. Committee For Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

8. Ahlgren, *supra* note 5, at A1. The MPCP is funded out of state aid to the Milwaukee Public Schools. WIS. STAT. § 119.23(4)-(5) (1989-90). Under the MPCP, the state directly pays schools chosen by parents instead of giving vouchers to parents to pay schools or tax credits to parents who pay private school tuition.

9. 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

Wisconsin Constitution under which it was challenged. First, the court found that the MPCP was not "local" legislation. Therefore, its passage as part of a multi-subject bill was not proscribed by the private or local bill clause of the Wisconsin Constitution.¹⁰ Second, the majority found that the private schools participating in the MPCP were not public district schools subject to the Wisconsin Constitution's requirement that they provide a uniform¹¹ "character of instruction."¹² Public schools satisfy this requirement, and the MPCP is merely an additional educational experiment to do more than that which is constitutionally mandated.¹³ Finally, the court held that the MPCP met the requirements of the implicit constitutional doctrine that public money be spent for a public purpose because it "contains sufficient and reasonable controls to attain its public purpose."¹⁴

Nonetheless, *Davis* left unclear two state constitutional issues. First, is there a presumption of constitutionality when a statute's enactment is challenged as violating a procedural constitutional provision? Second, when determining whether legislation addressing a statutory classification is "private" or "local," should a reviewing court consider only the general characteristics of that class, or the characteristics of specific cities within the class?

This Note begins with a summary of the facts of *Davis*. It then addresses and explores the background of the three state constitutional issues involved, discusses the majority and dissenting opinions, and analyzes the court's decision. This Note concludes by providing several future implications of *Davis v. Grover*.

II. STATEMENT OF THE CASE

The Milwaukee Parental Choice Program was enacted into law as part of a larger budget adjustment bill on April 27, 1990.¹⁵ The litigation sur-

10. *Id.* at 512, 480 N.W.2d at 462.

11. WIS. CONST. art. X, § 3.

12. *Davis*, 166 Wis. 2d at 538, 539, 480 N.W.2d at 473, 474 (citing *Kukor v. Grover*, 148 Wis. 2d 469, 492, 436 N.W.2d 568, 577 (1989)).

13. *Id.* at 539, 480 N.W.2d at 474.

14. *Id.* at 546, 480 N.W.2d at 477.

15. *Davis v. Grover*, 159 Wis. 2d 150, 158, 464 N.W.2d 220, 223 (Ct. App. 1990), *rev'd* 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

During 1988 and 1989, Wisconsin's Governor Thompson proposed programs allowing parents to send their children to the schools of their choice. *Id.* at 168-69, 464 N.W.2d at 228.

In October 1989, a bipartisan coalition of forty-seven members of the Assembly and nine Senate co-sponsors introduced the bill that eventually became the MPCP. It was referred to the Committee on Urban Education, which held a public hearing in February, 1990. After this hearing, where appearances or registrations for or against the bill were made by many of the parties interested in or affected by the bill, the committee recommended the passage of an amended ver-

rounding the MPCP was prompted when Superintendent of Public Instruction Herbert Grover required that schools participating in the MPCP file an "Intent to Participate" form, which required compliance with statutory and regulatory provisions in addition to those already required by section 119.23.¹⁶ On June 25, 1990, on behalf of eligible pupils, plaintiffs-respondents, Davis and others,¹⁷ sued for issuance of a writ of mandamus ordering the immediate implementation of the MPCP and enjoining Superintendent Grover from impairing implementation.¹⁸ Opponents, including Milwaukee teacher-parent and school administrator groups, as well as the Milwaukee branch of the NAACP,¹⁹ intervened on June 27, 1990, one day after the Wisconsin Supreme Court denied them original jurisdiction.²⁰

The circuit court did not find the MPCP facially unconstitutional.²¹ Judge Steingass held that, in light of the presumption of constitutionality given to legislation, the MPCP did not violate any of the three state constitutionally found provisions under which it was challenged. The court found that the MPCP satisfied the public purpose doctrine (i.e., the implicit constitutional requirement that public expenditures be only for public purposes) for two reasons: first, it served as an educational experiment whose results could benefit the entire state and second, it had internal controls adequate for this purpose.²² The court found that the Uniformity Clause²³

sion of the bill. After making an additional amendment and rejecting several others, the Assembly passed the bill by a 62-35 vote. *Id.* at 169, 464 N.W.2d at 228.

On March 15, 1990, Assembly Bill 601 went to the Wisconsin Senate where it was immediately referred to the Committee on Educational Financing, Higher Education and Tourism. BULLETIN OF THE PROCEEDINGS OF THE WISCONSIN LEGISLATURE 1989-90 SESSION, at 3-169 (1990). Five days later, on Monday, March 20, 1990, the Joint Finance committee added it to a budget adjustment bill. It was accompanied by the title, "Milwaukee Parental Choice Program," and an analysis by the Legislative Reference Bureau. 1989 Wis. S. Bill 542. The Senate passed the bill on March 21, 1990. *Davis v. Grover*, 166 Wis. 2d 501, 566, 480 N.W.2d 460, 486 (Bablitich, J., dissenting). The Assembly passed the budget adjustment bill and Governor Thompson signed it, but he vetoed the MPCP's sunset provision. *Davis*, 159 Wis. 2d at 170, 464 N.W.2d at 228.

16. *Davis v. Grover*, No. 90 CV 2576, at 4-5 (Dist. Ct. Branch 8, Aug. 6, 1990) (unpublished opinion), *rev'd*, 159 Wis. 2d 150, 464 N.W.2d 220 (Ct. App. 1990), *rev'd*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

17. *Davis*, 159 Wis. 2d at 155 n.1, 464 N.W.2d at 222 n.1.

18. *Davis*, No. 90 CV 2576, at 2.

19. *Id.* at 5-6.

20. *Davis*, 159 Wis. 2d at 155 n.1, 464 N.W.2d at 222 n.1.

21. *Davis*, No. 90 CV 2576, at 2. However, Judge Steingass found that the plaintiffs had not made sufficient showings to issue a temporary injunction and a writ of mandamus. Her Honor took the request under advisement until further information was secured. *Id.* at 24-25. The circuit court's final judgment, allowing the MPCP to proceed, was issued on August 10, 1990.

22. *Id.* at 6-11.

23. The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge

of the Wisconsin Constitution was not applicable because a private school does not become public by its acceptance of public money and pupils.²⁴

Additionally, the court determined that the MPCP was not a private or local bill, because education is a "state responsibility of statewide dimension," education in Milwaukee is a statewide concern, and the results of the experiment would be applied statewide.²⁵ Thus, although passed in a multi-subject bill, the Parental Choice Program was enacted constitutionally under the private bill clause of the Wisconsin Constitution.²⁶

Finally, Judge Steingass held that Superintendent Grover could not regulate private schools in the program "in a manner more onerous or demanding than that insisted upon for other participating programs and public schools."²⁷

The Wisconsin Court of Appeals reversed on the grounds that the MPCP was unconstitutionally enacted under the private bill clause of the Wisconsin Constitution²⁸ because it failed under the Wisconsin Supreme Court's test to prove that it was not "private or local" legislation. Thus, its passage as part of a multi-subject bill was unconstitutional under article IV, section 18 of the Wisconsin Constitution.²⁹ In dicta, the court suggested a new test for "experimental" legislation, which the Parental Choice Program might satisfy.³⁰

The Wisconsin Supreme Court reversed the decision of the court of appeals, finding that the MPCP satisfied the three constitutional provisions under which it was challenged. However, three justices wrote individual dissents.³¹ Even so, "[n]o injunction was ever issued against³² the Milwaukee Parental Choice Program, which continue[d] to operate."

for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize release of students during regular school hours.

WIS. CONST. art. X, § 3.

24. *Davis*, No. 90 CV 2576, at 15.

25. *Id.* at 18-19.

26. *Id.* at 10-19. "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." WIS. CONST. art. IV, § 18. The circuit court did not presume constitutionality when considering the article IV, section 18 challenge. *Davis*, No. 90 CV 2576, at 17.

27. *Davis*, No. 90 CV 2576, at 24. Superintendent Grover never appealed this issue. *Davis v. Grover*, 166 Wis. 2d 501, 518, 480 N.W.2d 460, 465 (1992).

28. *Davis v. Grover*, 159 Wis. 2d 150, 156, 464 N.W.2d 220, 222 (Ct. App. 1990), *rev'd*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992). The court did not address whether the program violated the Uniformity Clause or the public purpose doctrine. *Id.* at 157 n.3, 262 N.W.2d at 223 n.3.

29. *Id.* at 156-57, 464 N.W.2d at 223.

30. *Id.* at 167-68, 464 N.W.2d at 227.

31. Chief Justice Heffernan, Justice Abrahamson, and Justice Bablitch wrote separate dissenting opinions. *Davis*, 166 Wis. 2d at 548-76, 480 N.W.2d at 478-90.

III. DID PASSAGE OF THE MPCP VIOLATE THE PRIVATE OR LOCAL BILL CLAUSE?

A. Background of Article IV, Section 18 Law

In the nineteenth century, state legislators were pressured by their constituents to pass a variety of legislation and, consequently, laws affecting only private or local interests outnumbered laws affecting general statewide interests.³³ This special legislation on substantive matters often "fixed penalties, awarded new court trials, adjusted individual insolvencies, and granted divorces."³⁴ Unfavorable public reaction to this abuse of legislation, which amounted to the exercise of judicial power, led to the adoption of article IV, section 18.³⁵ Article IV, section 18 of the Wisconsin Constitution provides: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." It has remained unchanged since the adoption of the original constitution of 1848.³⁶

The Wisconsin Supreme Court recognizes three public policy purposes for article IV, section 18:

1) to encourage the legislature to devote its time to the state at large, its primary responsibility; 2) to avoid the specter of favoritism and discrimination, a potential which is inherent in laws of limited applicability; and 3) to alert the public through its elected representatives to the real nature and subject matter of legislation under consideration.³⁷

Article IV, section 18 case law has developed along two lines. In *Milwaukee Brewers Baseball Club v. Department of Health and Social Services*, the Wisconsin Supreme Court addressed the issue of legislation that is

32. *Id.* at 518, 480 N.W.2d at 465.

33. *Soo Line R.R. v. Department of Trans.*, 101 Wis. 2d 64, 71-72 & n.5, 303 N.W.2d 626, 630 & n.5 (1981).

34. JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 79 (1950).

35. *Milwaukee Brewers Baseball Club v. Department of Health & Social Servs.*, 130 Wis. 2d 79, 153, 387 N.W.2d 254, 286 (1986) (Steinmetz, J., concurring in part and dissenting in part). In 1871, section 31 was added to article IV of the Wisconsin Constitution. *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 904, 426 N.W.2d 591, 595 (1988). This section lists nine situations in which the legislature is prohibited from enacting special or private laws. Section 32 was included to allow the legislature to pass general laws dealing with the narrow situations enumerated in § 31, as long as "such laws shall be uniform in their operation throughout the state." *Id.* at 904-05 & n.3, 426 N.W.2d at 595-96 & n.3.

36. This provision first appeared as article VI, § 4 in the rejected 1846 constitution. *Reprinted in H.A. TENNEY & DAVID ATWOOD, MEMORIAL RECORD OF THE FATHERS OF WISCONSIN* 311 (1880).

37. *Milwaukee Brewers*, 130 Wis. 2d at 107-08, 115, 387 N.W.2d at 266, 269.

facially specific to any person, place, or thing.³⁸ It held that such legislation is private or local under article IV, section 18 unless: "1) the general subject matter of the provision relates to a state responsibility of statewide dimension; and 2) its enactment will have direct and immediate effect on a specific statewide concern or interest."³⁹

In *City of Brookfield v. Milwaukee Metropolitan Sewerage District*,⁴⁰ the Wisconsin Supreme Court analyzed "legislation that arises in a classification context that is not specific on its face and does not run afoul of the specific prohibitions of sec. 31 but allegedly runs afoul of sec. 18."⁴¹ The *Brookfield* court summarized a multi-rule test developed in cases arising under article IV, sections 31 and 32, which had come to be applied to section 18 cases,⁴² to determine whether legislation applying to general classifications (e.g., of cities) "is impermissibly local or private because the generality is simply a surface sham."⁴³ If a law meets the following criteria it will be considered general legislation and can be passed in a multi-subject bill:

First, the classification employed by the legislature must be based on substantial distinctions which make one class really different from another.

Second, the classification adopted must be germane to the purpose of the law.

Third, the classification must not be based on existing circumstances only. Instead, the classification must be subject to being open, such that other cities could join the class.

38. *Id.* The origins of the *Brewers* doctrine are found in *Milwaukee County v. Isenring*, 109 Wis. 9, 85 N.W. 131 (1901), which held a statute to be "local" or "private" under article IV, § 18, if it applied to a particular site or entity. *Id.* Even a law affecting a specified locality was held to be not local if its subject was a statewide concern. *Monka v. State Conservation Comm'n*, 202 Wis. 39, 42, 231 N.W. 273, 274 (1930). The court in *Soo Line R.R. v. Department Of Trans.*, 101 Wis. 2d 64, 303 N.W.2d 626 (1981), found a statute (enacted as part of a multi-subject budget bill) requiring a specific railroad to build an at-grade crossing at a specific location to be impermissibly local under article IV, § 18 because it did not have a sufficiently direct effect on the statewide interest in highway safety. *Id.* at 75, 303 N.W.2d at 632-33. The *Brewers* court held that a statute, which established a state prison at a specific site in Milwaukee's Menomonee River Valley had a sufficiently direct and immediate effect on the statewide concern of prison overcrowding and thus was constitutional under article IV, § 18. *Milwaukee Brewers*, 130 Wis. 2d at 117-21, 387 N.W.2d at 270-72.

39. *Milwaukee Brewers*, 130 Wis. 2d at 115, 387 N.W.2d at 269.

40. 144 Wis. 2d 896, 426 N.W.2d 591 (1988).

41. *Id.* at 912, 426 N.W.2d at 599. A third category of special legislation, that applying to the situations enumerated in article IV, § 31, is beyond the scope of this Note. See *supra* note 35.

42. See *Lamasco Realty Co. v. City of Milwaukee*, 242 Wis. 357, 8 N.W.2d 372 (1943); *Whitefish Bay v. Milwaukee County*, 224 Wis. 373, 271 N.W. 416 (1937); *Wagner v. Milwaukee County*, 112 Wis. 601, 88 N.W. 577 (1902).

43. *Brookfield*, 144 Wis. 2d at 914, 426 N.W.2d at 600.

Fourth, when a law applies to a class, it must apply equally to all members of the class. . . .

. . . .

[F]ifth . . . the characteristics of each class should be so far different from those of the other classes so as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation. . . .

. . . .

[S]ixth . . . when the legislation is curative in nature, as long as the curative legislation applies equally to all members of the class, the legislation is general.⁴⁴

Whether or not there is a presumption of constitutionality in article IV, section 18 cases has been in dispute. In 1981, the Wisconsin Supreme Court held that a "statute is presumed constitutional and . . . the challenger must prove the law to be unconstitutional beyond a reasonable doubt."⁴⁵ There has been a traditional presumption of constitutionality in cases challenging "special and private laws" under article IV, section 31, which involve public policy concerns similar to those addressed in section 18.⁴⁶ The presumption is still viable in other types of cases.⁴⁷ The presumption of constitutionality is based on the constitutional doctrine of separation of powers in which the three branches of government are considered equals. It presumes that the legislature acts knowingly when it passes legislation.

In 1988, the Wisconsin Supreme Court in *Brookfield* first departed from the presumption of constitutionality in article IV, section 18 cases: "because the legislature is alleged to have violated a law of constitutional stature which mandates the form in which bills must pass"⁴⁸ The court's concern focused on article IV, section 18's procedural requirement that legislation burdening or benefiting private entities be passed in "single subject,

44. *Id.* at 907-08, 426 N.W.2d at 597. The first four criteria were first outlined in *Johnson v. City of Milwaukee*, 88 Wis. 383, 390-92, 60 N.W. 270, 271-72 (1894). The fifth was added by *State ex rel. Risch v. Board of Trustees*, 121 Wis. 44, 54, 98 N.W. 954, 957 (1904). The sixth originated in *Madison Metro. Sewerage Dist. v. Stein*, 47 Wis. 2d 349, 364, 177 N.W.2d 131, 136 (1970).

45. *Soo Line R.R. v. Department of Trans.*, 101 Wis. 2d 64, 76, 303 N.W.2d 626, 632 (1981).

46. *See generally* *Madison Metro. Sewerage Dist. v. Stein*, 47 Wis. 2d 349, 177 N.W.2d 131, 135 (1970); *State ex rel. Risch v. Board of Trustees*, 121 Wis. 44, 54, 98 N.W. 954, 958 (1904); *Adams v. City of Beloit*, 105 Wis. 363, 81 N.W. 869, 872 (1900).

47. *E.g.*, *GTE Sprint Communications Corp. v. Wisconsin Bell*, 155 Wis. 2d 184, 192, 454 N.W.2d 797, 800 (1990).

48. *Brookfield*, 144 Wis. 2d at 912-13 n.5, 426 N.W.2d at 599 n.5. Curiously, the *Brookfield* court cited *Soo Line*, 101 Wis. 2d 64, 303 N.W.2d 626, which did presume constitutionality. *Brookfield*, 144 Wis. 2d at 902, 426 N.W.2d at 592.

clearly titled bills."⁴⁹ The purpose of this requirement was to prevent such legislation from being smuggled through the legislature by "internal logrolling."⁵⁰

In the concurring and dissenting opinions written by Justices Ceci and Steinmetz, in *Brewers*, the justices emphasized that when legislators must vote upon a state budget bill which also includes private or local legislation, as had occurred in *Brewers*, *Brookfield*, and *Davis*, they cannot vote their convictions on both.⁵¹ The *Brookfield* court recognized that under such circumstances the legislature cannot be presumed to have given the full consideration upon which the presumption of constitutionality is based.⁵² "Instead, the court will proceed to determine whether the law is procedurally proper without recourse to the rational basis test."⁵³

B. The Majority And Concurring Opinions

Justice Callow, writing for the majority in *Davis v. Grover*,⁵⁴ held that the Milwaukee Parental Choice Program⁵⁵ is not a private or local bill, and thus, not subject to the procedural requirements of article IV, section 18 of the Wisconsin Constitution.⁵⁶ The majority two-part analysis began by considering "whether the process in which the bill was enacted deserves a presumption of constitutionality."⁵⁷

Addressing the *Brookfield* court's concern of whether the legislature had adequately considered or discussed challenged legislation passed as part of a multi-subject bill, the court examined the record of the MPCP's passage.⁵⁸ The court considered such factors as: the fact that the MPCP was proposed in several consecutive years; its introduction by a significant number of legislators; the Assembly Committee on Urban Education's public hearing on the proposed program; the Assembly's passage of the program as a separate, single subject bill; and the Senate's debate and adoption

49. *Brookfield*, 144 Wis. 2d at 912 n.5, 426 N.W.2d at 599 n.5.

50. *Id.* Wisconsin has criminalized logrolling by legislators trading votes, a different but related issue. WIS. STAT. § 13.05 (1989-90).

51. *Milwaukee Brewers Baseball Club v. Department of Health & Social Servs.*, 130 Wis. 2d 79, 145, 156-58, 387 N.W.2d 254, 282, 287-88 (1986) (Ceci, J., concurring in part and dissenting in part).

52. *Brookfield*, 144 Wis. 2d at 918-19 n.6, 426 N.W.2d at 601 n.6.

53. *Id.* at 913 n.5, 426 N.W.2d at 599 n.5.

54. *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992). Justice Callow was joined by Justices Day and Steinmetz. Justice Ceci concurred.

55. WIS. STAT. § 119.23 (1989-90).

56. *Davis*, 166 Wis. 2d at 512, 480 N.W.2d at 462.

57. *Id.* at 520, 480 N.W.2d at 466.

58. *Id.* at 521, 480 N.W.2d at 466 (citing *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 918-19 n.6, 426 N.W.2d 591, 601 n.6).

of an amendment specific to the MPCP.⁵⁹ The majority found "no evidence in this case that suggests the program was smuggled or logrolled through the legislature without the benefit of deliberate legislative consideration."⁶⁰ It concluded that the legislature had "intelligently participate[d] in considering" the program, and therefore, the bill's passage should be accorded a presumption of constitutionality.⁶¹

The *Davis* majority next turned to the issue of whether the Milwaukee Parental Choice Program is a private or local bill in violation of article IV, section 18. It detailed three prongs of analysis: The *Brewers* test for legislation facially specific to people, places, or entities; the specific prohibitions and exemptions of article IV, sections 31 and 32; and the *Brookfield* test for classification legislation passed in multi-subject bills.⁶² The supreme court rejected the court of appeals' suggestion that it adopt a modified version of the *Brewers* test for allegedly "experimental" legislation.⁶³

The court used the *Brookfield* test to determine that Wisconsin Statute section 119.23 involves a classification. This decision was based upon several factors. The MPCP's text and placement in the statutes indicated that it applied to any school district in a first class city.⁶⁴ Furthermore, the Milwaukee Parental Choice Program was not limited to Milwaukee; Madison has the required population of 150,000 or more to be a first class city and could declare itself to be one.⁶⁵ Although the legislation expressly referred to Milwaukee, *i.e.*, the Milwaukee Parental Choice Program, the supreme court, by analogy, applied the rule that the title of a statute is not part of the statute itself to encompass legislative bills as well.⁶⁶ The court determined that the MPCP "involve[d] a classification and not expressly a specific person, place or thing."⁶⁷

The majority applied the five-part *Brookfield* test to determine whether the MPCP was private or local legislation under article IV, section 18 of the Wisconsin Constitution. The first element is that "the classification employed by the legislature must be based on substantial distinctions which

59. *See id.* at 521-22, 480 N.W.2d at 466.

60. *Id.* at 522, 480 N.W.2d at 467.

61. *Id.* at 523, 480 N.W.2d at 467 (citation omitted).

62. *Id.* at 524-25, 480 N.W.2d at 467-68.

63. *Id.* at 527 n.11, 480 N.W.2d at 469 n.11.

64. *Id.* at 526-27, 480 N.W.2d at 468-69. Chapter 119 applies only to cities of the first class. WIS. STAT. § 119.01 (1989-90).

65. *Id.* at 527, 480 N.W.2d at 469; *see* WIS. STAT. § 62.05 (1989-90).

66. *Davis*, 166 Wis. 2d at 527, 480 N.W.2d at 469; *see* WIS. STAT. § 990.001(6) (1989-90); *Wisconsin Valley Improvement Co. v. Public Serv. Comm'n*, 9 Wis. 2d 606, 618, 101 N.W.2d 798, 804 (1960).

67. *Davis*, 166 Wis. 2d at 527, 480 N.W.2d at 469.

make one class really different from another.”⁶⁸ The MPCP applied to first class cities only.⁶⁹ The court cited cases recognizing that first class cities “by virtue of their large population and concentration of poverty, are substantially distinct from other cities.”⁷⁰ The court referred to statistical evidence that the socio-economic disparities and educational problems of Wisconsin’s first class city, Milwaukee, are greater than elsewhere in the state. It concluded that the classification to which the MPCP applied—first class city school districts—is based on substantial distinctions from other classes of cities.⁷¹

The majority then considered the second element, that “the classification adopted must be germane to the purpose of the law.”⁷² It agreed with the trial court and the court of appeals that the MPCP was an “experiment intended to address a perceived problem of inadequate educational opportunities for disadvantaged children.”⁷³ The majority reached this conclusion based upon the MPCP’s requirement of the compilation and reporting of data and its original five-year sunset provision, which Governor Thompson vetoed.⁷⁴ The court concluded that locating the Parental Choice Program in Wisconsin’s first class city was germane to the law’s purpose:

Clearly, improving the quality of education and educational opportunities in Wisconsin is a matter of statewide importance. The best location to experiment with legislation aimed at improving the quality of education is in a first class city, a large urban area where the socio-economic and educational disparities are greatest and the private educational choices are most abundant. The experimental nature of the MPCP places this case in direct contrast to *Brookfield* where we found no relationship between Milwaukee county’s size and the challenged financing scheme.⁷⁵

The majority found that the MPCP met the *Brookfield* test’s third requirement that “the classification must be subject to being open, such that

68. *Id.* (quoting *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 907, 426 N.W.2d 591, 597 (1988)).

69. *Id.*; see WIS. STAT. § 62.05 (1989-90).

70. *Davis*, 166 Wis. 2d at 528, 480 N.W.2d at 469 (citing *Lamasco Realty Co. v. Milwaukee*, 242 Wis. 357, 377, 8 N.W.2d 372, 381 (1943) and *State ex rel. Nyberg v. Board of Sch. Directors*, 190 Wis. 570, 577, 209 N.W. 683, 686 (1926)).

71. See *Davis*, 166 Wis. 2d at 528-30, 480 N.W.2d at 469-70.

72. *Id.* at 530, 480 N.W.2d at 470 (quoting *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d, 896, 907, 426 N.W.2d 591, 597 (1988)).

73. *Id.*

74. *Id.* at 533-34, 480 N.W.2d at 471-72; see WIS. STAT. § 119.23 (1989-90).

75. *Id.* at 534-35, 480 N.W.2d at 472 (citing *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d, 896, 920, 426 N.W.2d 591, 602 (1988)).

other cities could join the class.”⁷⁶ Because Madison has a sufficient population and need only declare itself a city of the first class to become one, the MPCP’s first class city classification is still open.⁷⁷

The majority found no indication that the MPCP would not be applied equally to other cities joining the first class designation in the future, thereby satisfying the fourth element of the *Brookfield* test.⁷⁸

The test’s fifth element is that “the characteristics of each class should be so far different from those of the other classes so as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.”⁷⁹ The majority reconsidered the socio-economic and educational problems, as well as the variety of nonsectarian private schools in Milwaukee, and found that the fifth element was satisfied.⁸⁰

The majority concluded that the Milwaukee Parental Choice Program, which applied to first class cities, was not private or local legislation. Thus, its passage as part of a multi-subject budget adjustment bill was not unconstitutional under article IV, section 18 of the Wisconsin Constitution.⁸¹

Justice Ceci’s brief concurrence expressed his full accord with the majority.⁸² He noted the MPCP’s purpose as an experiment in improving education.⁸³

C. The Dissents

Chief Justice Heffernan first challenged the majority’s finding of a presumption of constitutionality.⁸⁴ The chief justice noted: “One of the rationales that justifies the use of the presumption of constitutionality is that when the legislature follows the constitutionally mandated procedures, the democratic safeguards ensure that the law is the will of the legislature.”⁸⁵ The chief justice argued that this presumption cannot attach when the legislature is alleged to have not followed constitutionally mandated procedures, such as enacting a private or local law as part of a multi-subject bill.⁸⁶

76. *Id.* at 535, 480 N.W.2d at 472.

77. *Id.* at 535-36, 480 N.W.2d at 472.

78. *Id.* at 536, 480 N.W.2d at 472-73.

79. *Id.* at 536, 480 N.W.2d at 473.

80. *Id.*

81. *Id.* at 536-37, 480 N.W.2d at 473.

82. *Id.* at 546-48, 480 N.W.2d at 477-78 (Ceci, J., concurring).

83. *Id.* at 547, 480 N.W.2d at 477.

84. *Id.* at 548-49, 480 N.W.2d at 478 (Heffernan, C.J., dissenting).

85. *Id.* at 549, 480 N.W.2d at 478 (Heffernan, C.J., dissenting).

86. *Id.* (citing *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 912-13 n.5., 426 N.W.2d 591, 599 n.5. (1988)).

Chief Justice Heffernan cited *Brewers*⁸⁷ to argue that article IV, section 18's requirement that private or local legislation not be passed as part of a multi-subject bill is not only to prevent legislative fraud, but also to make legislators accountable to their constituents for their votes on private or local issues.⁸⁸ The chief justice found the majority's attempt to review the degree of consideration or deliberation accorded a piece of legislation not only "an improper intrusion into the legislative process," but also impossible.⁸⁹ The chief justice suggested that review under article IV, section 18 should be limited to the bill's face and should be done with a "presumption of regularity" that a public officer does not violate his duty.⁹⁰

Chief Justice Heffernan found the Milwaukee Parental Choice Program to be private or local legislation not only because of its title, its application to Milwaukee, and the majority's citation of statistics regarding Milwaukee, but also because it failed the first two elements of the *Brookfield* test.⁹¹ Citing the court of appeals' holding that the *Brookfield* analysis can only consider the characteristics of a first class city, not the specific characteristics of a particular first class city,⁹² the chief justice noted that not all first class cities will necessarily have the concentration of poverty which the majority found to make them substantially distinct from other cities.⁹³

After concluding that the first element of the *Brookfield* test was not satisfied, the chief justice found that the MPCP's first class city classification was not germane to the law's purpose. First, Chief Justice Heffernan was not convinced that the MPCP was an experiment: nothing on the bill's face indicated it to be "experimental," it lacked both a statement of legislative purpose to conduct an experiment and a provision for expansion of the program if it succeeded, and Governor Thompson vetoed the five-year sunset provision.⁹⁴ Second, the chief justice agreed with the court of appeals that even if the MPCP was an experiment, it "is not germane to limit the

87. *Id.* at 550, 480 N.W.2d at 478 (Heffernan, C.J., dissenting) (Steinmetz, J., concurring in part and dissenting in part and Ceci, J., concurring in part and dissenting in part) (citing *Milwaukee Brewers Baseball Club v. Department of Health & Social Servs.*, 130 Wis. 2d 79, 145, 156-58, 387 N.W.2d 254, 282, 287-88 (1986)).

88. *See id.*

89. *Id.* at 550, 480 N.W.2d at 478-79 (Heffernan, C.J., dissenting).

90. *Id.* at 550, 480 N.W.2d at 479 (Heffernan, C.J., dissenting) (citing *Integration of Bar Case*, 244 Wis. 8, 28, 11 N.W.2d 604, 614 (1943)).

91. *See id.* at 550-53, 480 N.W.2d at 479-80 (Heffernan, C.J., dissenting).

92. *Id.* (Heffernan, C.J., dissenting) (citing *Davis v. Grover*, 159 Wis. 2d 150, 162, 464 N.W.2d 220, 225 (Ct. App. 1990)).

93. *See id.* at 551-52, 480 N.W.2d at 479 (Heffernan, C.J., dissenting).

94. *Id.* at 553, 480 N.W.2d at 480 (Heffernan, C.J., dissenting).

experiment to the largest city in the state, or to any distinct class of cities in the state.”⁹⁵

In her dissent, Justice Abrahamson expressed her dissatisfaction with all analyses and tests for determining what constitutes a local or private law as opposed to a general law: the majority and dissenting opinions, the *Brookfield* test as to whether a law sets forth a classification, and the *Brewers* test as to whether a law applies to a specific place or entity.⁹⁶ Justice Abrahamson was concerned that the “majority opinion, like the court’s prior opinions, again fails to explain the overlap between the classification test under art. IV., sec. 18, and the test under the state constitutional equal protection guarantee.”⁹⁷

Justice Abrahamson agreed with Chief Justice Heffernan’s and Justice Bablitch’s concern that the majority’s presumption of constitutionality based upon the degree of consideration granted a law by the legislature “seriously infringes on the legislature’s autonomy. . . . Nothing in the constitution directly or indirectly empowers this court to measure the legislative consideration of a bill for adequacy or intelligence.”⁹⁸ Justice Abrahamson emphasized the need for the simplest possible test to determine whether a bill is private or local.⁹⁹

Justice Abrahamson rejected the other dissenters’ suggestion that no presumption of constitutionality should apply to legislation challenged as violative of a procedural constitutional provision when she questioned the practical significance of a presumption of constitutionality.¹⁰⁰ Justice Abrahamson echoed Chief Justice Heffernan’s suggestion that a law challenged under article IV, section 18 be accorded a “presumption of regularity.”¹⁰¹

Justice Bablitch’s dissent focused first upon the paucity of consideration given the MPCP by the legislature, citing the Wisconsin Assembly and Senate Bulletin to show that the Senate never “intelligently participate[d] in

95. *Id.* at 554, 480 N.W.2d at 480 (Heffernan, C.J., dissenting); see also *Davis v. Grover*, 159 Wis. 2d, 150, 165, 464 N.W.2d, 220, 226 (Ct. App. 1990).

96. *Davis v. Grover*, 166 Wis. 2d 501, 563, 480 N.W.2d 460, 484 (Abrahamson, J., dissenting). “Chief Justice Heffernan’s and Justice Bablitch’s dissents add the possibility of the court’s not accepting the legislature’s classification, recharacterizing the legislation, and testing the court-imposed classification for constitutionality.” *Id.*

97. *Id.* at 562, 480 N.W.2d at 484 (Abrahamson, J., dissenting) “EQUALITY; INHERENT RIGHTS. SECTION 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.” WIS. CONST. art. 1, § 1 (bold in original).

98. *Davis*, 166 Wis. 2d at 563-64, 480 N.W.2d at 484 (Abrahamson, J., dissenting).

99. *Id.* at 564-65, 480 N.W.2d at 485 (Abrahamson, J., dissenting).

100. *Id.* at 564 & n.13, 480 N.W.2d at 484-85 & n.13 (Abrahamson, J., dissenting).

101. *Id.* at 564, 480 N.W.2d at 484-85 (Abrahamson, J., dissenting).

considering" it, contrary to the majority's assertion.¹⁰² The justice would not afford a presumption of constitutionality to legislation challenged as procedurally unconstitutional because, as a facially private or local law in a multi-subject bill, it was violative of article IV, section 18 of the Wisconsin Constitution.¹⁰³ However, rather than presuming unconstitutionality, Justice Bablitch attached no presumption, carefully scrutinizing such legislation instead.¹⁰⁴

Justice Bablitch suggested that the classification analyzed by the other justices, that of "school children residing in cities of the first class and attending school districts within cities of the first class,"¹⁰⁵ is not the only one adopted by the MPCP.¹⁰⁶ The MPCP also adopted the classification of private schools in first class cities.¹⁰⁷ The justice reasoned that this classification failed the first prong of the classification tests because private schools in first class cities are not substantially distinct from all other private schools in Wisconsin.¹⁰⁸ Justice Bablitch did not deem this classification to be germane to the "avowed purpose of educational experimentation."¹⁰⁹

D. Analysis

The *Davis* majority held that the Milwaukee Parental Choice Program was not a private or local law. Therefore, its enactment was not unconstitutional under article IV, section 18's prohibition of the passage of such legislation as part of a multi-subject bill. However, the Wisconsin Supreme Court's divided decision failed to clarify this area of the law.

Should a reviewing court presume constitutionality when the procedure under which a statute was enacted is challenged as unconstitutional? When a court reviews a statute challenged as violating a substantive constitutional provision, it presumes the statute is constitutional. This deference, based upon the separation of powers doctrine, presumes that the legislature, which is accountable to the electorate, "has already examined the questions of fact and value choice embodied in the statute."¹¹⁰ The majority searched the case record in an attempt to discover whether the legislature gave the

102. *Id.* at 566, 480 N.W.2d at 485 (Bablitch, J., dissenting); see *supra* text accompanying note 61.

103. *Id.* at 573-74, 480 N.W.2d at 488-89 (Bablitch, J., dissenting).

104. *Id.* at 574, 480 N.W.2d at 489 (Bablitch, J., dissenting).

105. *Id.* at 568, 480 N.W.2d at 486 (Bablitch, J., dissenting).

106. *Id.*

107. *Id.*

108. *Id.* at 569, 480 N.W.2d at 486-87 (Bablitch, J., dissenting).

109. *Id.*, 480 N.W.2d at 487 (Bablitch, J., dissenting).

110. JAMES W. HURST, DEALING WITH STATUTES 88-89 (1982).

MPCP sufficient consideration to satisfy the underlying purposes of article IV, section 18: ensuring the public accountability of the legislature, guarding "against the danger of legislation, affecting private or local interests, being smuggled through the legislature,"¹¹¹ and avoiding internal logrolling by the legislature.¹¹² The majority found that the legislature gave the MPCP sufficient consideration to presume these concerns had been met.

However, as Chief Justice Heffernan emphasized, such a post hoc attempt to discern how thoroughly the legislature considered a bill is an infringement upon the legislature's role by the judicial branch.¹¹³ Moreover, it is nearly impossible to make such an investigation based upon whatever scant records may be available of the state legislative process. Thus, Justice Bablitch's attempt to prove a lack of legislative consideration was also futile.¹¹⁴

The *Brookfield* court's departure from the traditional presumption of constitutionality in article IV, section 18 cases was premised upon the concept that procedural requirements are intended to ensure that the legislature deliberates upon and is accountable for the legislation it passes, thus making it deserving of a presumption of constitutionality. If the legislature did not follow the procedural requirements, the challenged statute should not be presumed constitutional. However, an article IV, section 18 analysis determines whether or not the challenged law is local or private and thus whether it was enacted in compliance with the procedural requirements of the constitution. It is pointless to make any presumption as to the law's constitutionality before actually determining whether the procedural requirements upon which this presumption is based were followed. Thus, the best approach is that suggested by Chief Justice Heffernan¹¹⁵ and Justice Abrahamson:¹¹⁶ In article IV, section 18 challenges, a reviewing court should begin with a presumption of regularity that the legislature did not violate its duty.

Was the *Davis* majority correct in holding that the Milwaukee Parental Choice Program was not private or local legislation under article IV, section 18 of Wisconsin's Constitution? The court applied the test set forth in

111. *Milwaukee County v. Isenring*, 109 Wis. 9, 23, 85 N.W. 131, 136 (1901).

112. *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 912-13 n.5, 426 N.W.2d 591, 599 n.5 (1988).

113. *Davis*, 166 Wis. 2d at 550, 480 N.W.2d at 478-79 (1992) (Heffernan, C.J., dissenting).

114. *Id.* at 566, 480 N.W.2d at 485-86 (Bablitch, J., dissenting).

115. *Id.* at 550, 480 N.W.2d at 479 (Heffernan, C.J., dissenting) (quoting *Integration of Bar Case*, 244 Wis. 8, 28, 11 N.W.2d 604, 614 (1943)).

116. 166 Wis. 2d at 564, 480 N.W.2d at 485 (Abrahamson, J., dissenting). See also *id.* at 574, 480 N.W.2d at 489 (Bablitch, J., dissenting) (a court should not begin its review with a presumption of unconstitutionality).

Brookfield v. Milwaukee Metropolitan Sewerage District,¹¹⁷ because it correctly characterized section 119.23 as classification legislation. The MPCP is part of Wisconsin Statutes chapter 119, which applies to a First Class City School System. The majority's application by analogy of the rule that the title of a statute is not part of the statute to the Milwaukee Parental Choice Program bill was a useful expansion of this canon of construction.¹¹⁸

The court of appeals suggested a modified version of the *Brewers* test for entity-specific legislation to determine whether a piece of "experimental" legislation is private or local. The supreme court wisely rejected this suggestion, recognizing that it would "unnecessarily further complicate this area of law."¹¹⁹

Whether the majority correctly applied the *Brookfield* test to determine that the MPCP was not private or local legislation turns upon the question of whether the test can be applied only to the general characteristics of the classification (e.g., a population over 150,000 and a mayoral proclamation of first class city status) or to the de facto characteristics of a city within a class of cities. The law on this issue is uncertain.

The *Brookfield* court seemed to apply the test only to the general characteristics of a first class city sewerage district.¹²⁰ In its narrow search for justification in the section 18 context, the *Brookfield* court stated that it should avoid seeking post hoc justification for legislation because it was "ill suited" to decide "economic and political" issues.¹²¹

The *Davis* majority's reliance upon a line of cases indicating that the specific characteristics of Wisconsin's first class city can be considered¹²² may appeal more to common sense than does the formal approach of considering only the facial characteristics of the class. However, it does not serve the goal of determining whether classification legislation is local or private. This goal is essentially to decide whether a piece of classification legislation is general enough to demonstrate that the legislature is not trying to smuggle a bill that affects only narrow interests into a multi-subject bill.

Courts analyzing bills involving first class cities under article IV, section 18 may be confused because Milwaukee is Wisconsin's only first class city. If there were other first class cities in Wisconsin, it might be obvious that

117. *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 144 Wis. 2d 896, 907-08, 426 N.W.2d 591, 597 (1988).

118. See *supra* notes 66-67 and accompanying text.

119. *Davis*, 166 Wis. 2d at 527 n.11, 480 N.W.2d at 469 n.11 (1992).

120. *Brookfield*, 144 Wis. 2d at 916-17, 426 N.W.2d at 600-01.

121. *Id.* at 918 n.6, 426 N.W.2d at 601 n.6.

122. See *supra* note 70 and accompanying text.

courts determining whether a classification is private or local should consider only the general characteristics of first class cities, because not all such cities will share the same specific characteristics.

Applying the elements of the *Brookfield* test to the general characteristics of first class city school districts would be illustrative. First, Milwaukee's population of over 150,000 and declaration of being a first class city does not make it " 'substantially distinct' from other cities such that 'it is necessary for them, as opposed to all other' cities, to have the choice program."¹²³ The second element, that the classification must be germane to the law's purpose, might not be satisfied. Applying the Parental Choice Program to all cities with over 150,000 residents might not "be closely akin to, or have a close relationship with, the purpose[s]"¹²⁴ of testing whether public funding of private education can help solve Wisconsin's educational problems, because not all cities that large may have the same educational problems.

The *Davis* court's analysis of whether the MPCP was appropriate for the specific characteristics of Wisconsin's current first class city seems reasonable and is based on precedent. However, not all cities that might join the first class may share those characteristics. Thus, a court reviewing a piece of legislation (within a multi-subject bill and not separately titled) addressing a statutory classification should look at the general characteristics of the class to determine whether the statute is appropriate for the entire class or whether it affects only local or private interests, which is forbidden by article IV, section 18.

IV. DOES THE MILWAUKEE PARENTAL CHOICE PROGRAM VIOLATE THE UNIFORMITY CLAUSE?

A. *Background of Article X, Section 3 Law*

The first substantive issue on which the Milwaukee Parental Choice Program was challenged was article X, section 3 of the Wisconsin Constitution, which states in relevant part: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years."¹²⁵ This issue turns upon the definitions of "district schools" and of the uniformity required of them.

123. *Davis*, 166 Wis. 2d at 552, 480 N.W.2d at 479 (Bablitch, J., dissenting) (citing *Brookfield*, 144 Wis. 2d at 916, 426 N.W.2d at 600).

124. *Brookfield*, 144 Wis. 2d at 917, 426 N.W.2d at 601.

125. WIS. CONST. art. X, sec. 3.

These definitions are intertwined with the history of public education in Wisconsin.

Territorial Wisconsin had several types of schools. Local schools, which were interchangeably called "district," "common," or "primary," were organized on a district level and were financed by district property taxes, charges made by the district to each student, and tuition charged by the teacher.¹²⁶ There were two types of private schools financed by tuition charges: "normal schools" that taught teachers and college preparatory "academies."¹²⁷

The 1845 creation of the first free public school in what is now Kenosha was a catalyst at the constitutional convention of 1846¹²⁸ for the proposal of a statewide system of free public schools. The rejected Wisconsin Constitution of 1846 included a provision similar to article X, section 3.¹²⁹ What eventually became article X, section 3 was not controversial at either of Wisconsin's constitutional conventions.¹³⁰ The education committee of the 1847-1848 convention proposed that the constitution's education article require state funding of a comprehensive educational system, including district schools, the state university, and private county academies to educate teachers for the district schools.¹³¹ However, the version of article X passed by the constitutional convention required state funding of only district schools and the state university.¹³²

The Wisconsin Constitution does not specifically define "district schools." Schools in Wisconsin have been organized on a district basis since 1841.¹³³ When the framers of the Wisconsin Constitution provided for state funding of "district schools" in article X, section 3, they must have

126. 64 Op. Att'y Gen. 24, 37 (1975).

127. *Id.*

128. CONRAD E. PATZER, PUBLIC EDUCATION IN WISCONSIN, 11-15, 18 (1924).

129. The rejected Constitution read as follows: "The legislature shall provide for a system of common schools, which shall be as nearly uniform as may be throughout the state, and the common schools shall be equally free to all children, and no sectarian instruction be used or permitted in any common school in this state." WIS. CONST. art. IX, § 4 (1846), reprinted in TENNEY & ATWOOD, *supra* note 36, at 317.

130. Erik LeRoy, Comment, *The Egalitarian Roots of the Education Article of the Wisconsin Constitution: Old History, New Interpretation*, Buse v. Smith Criticized, 1981 WIS. L. REV. 1325, 1350.

131. Ray A. Brown, *The Making of the Wisconsin Constitution*, 1952 WIS. L. REV. 23, 54-55.

132. *Id.* The framers of the state constitution were overly optimistic in their belief that there would be a surplus of school funds from the sale of federal lands. *Id.* at 55-56. Article X, § 2 provides that if any surplus school funds remain after supporting the common schools, they should "be appropriated to the support and maintenance of academies and normal schools." *Id.* at 55-56; see also WIS. CONST. art. X, § 2(2).

133. PATZER, *supra* note 128, at 9.

been referring to publicly funded "schools maintained in districts after they are created."¹³⁴ Defining their terminology was not the framers' primary concern:

An examination of the debates in the conventions that framed our present constitution and the constitution of 1846 (which contained a similar provision) discloses that the members of those conventions, when they were framing the article relating to schools, were concerned, not with the method of forming school districts, but with the character of instruction that should be given in those schools after the districts were formed, —with the training that these schools should give to the future citizens of Wisconsin.

Viewing the terms of this constitutional provision in the light of its express terms as well as of the purpose which actuated those who drafted it, *we conclude that the requirement as to uniformity applies to the districts after they are formed, —to the character of the instruction given, —rather than to the means by which they are established and their boundaries fixed.*¹³⁵

Recently, the Wisconsin Supreme Court defined the character of instruction, which is required by article X, section 3 to be uniform in district schools, as being "legislatively regulated by sec. 121.02, Stats., regarding, for example, minimum standards for teacher certification, minimal number of school days, and standard school curriculum."¹³⁶

B. The Majority Opinion

Justice Callow began by summarizing the argument of the opponents of the Milwaukee Parental Choice Program: although the schools participating in the MPCP were "district schools" under article X, section 3, they failed to provide a uniform "character of instruction" because they were not subject to section 121.02 of the Wisconsin Statutes.¹³⁷

The majority held that the MPCP schools were not "district schools" subject to article X, section 3, for several reasons. The MPCP "unambiguously refers to nonsectarian private schools," and private schools are defined under three sections of the Wisconsin Statutes.¹³⁸ Moreover, the majority rejected the suggestion that because "[p]ublic schools are the ele-

134. *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 289, 221 N.W. 860, 862 (1928).

135. *Kukor v. Grover*, 148 Wis. 2d 469, 486, 436 N.W.2d 568, 575 (1989) (emphasis added) (quoting *Zilisch*, 197 Wis. at 289-90, 221 N.W. at 862 (1928)).

136. *Id.* at 492-93, 436 N.W.2d at 577-78 (footnote omitted).

137. *Davis v. Grover*, 166 Wis. 2d 501, 537, 480 N.W.2d 460, 473 (1992).

138. *Id.* at 538, 480 N.W.2d at 473. "Private school" means an institution with a private educational program that meets all of the criteria under § 118.165(1) or is determined to be a private school by the state superintendent under § 118.167. Wis. STAT. § 115.001(3r) (1989-90).

mentary and high schools supported by public taxation,"¹³⁹ the MPCP schools' receipt of tax money makes them "district schools."¹⁴⁰ "In no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school. We decline the opportunity to adopt such a conclusion here."¹⁴¹

The majority was satisfied that the existence of private schools receiving public money, in addition to public schools, did not violate the uniformity clause. "[W]hen the legislature has provided for each such child the privileges of a district school, which he or she may freely enjoy, the constitutional requirement in that behalf is complied with."¹⁴² The majority held that article X, section 3 requires the legislature to provide the opportunity for all Wisconsin children to receive a free and uniform basic education, rather than requiring the legislature to ensure that all children take advantage of this opportunity.¹⁴³ The *Davis* majority upheld the Wisconsin Supreme Court's conclusion in *Kukor v. Grover*¹⁴⁴ that the uniform "character of instruction" imposed on district schools is legislatively regulated by section 121.02 of the Wisconsin Statutes.¹⁴⁵

C. *The Abrahamson Dissent*

Justice Abrahamson wrote the only dissenting opinion that discussed the Uniformity Clause.¹⁴⁶ After concluding that the majority's characterization of the MPCP as an experiment left the program subject to a successful constitutional challenge if its coverage or duration were to expand beyond an extent necessary for experimentation, the justice addressed article X, section 3.

First, Justice Abrahamson concluded that the "Parental Choice Program violates the mandate of article X that the legislature provide a system of free public education for children of a certain age."¹⁴⁷ Noting that the

139. WIS. STAT. § 115.01 (1989-90).

140. *Davis*, 166 Wis. 2d at 539, 480 N.W.2d at 474.

141. *Id.* at 540, 480 N.W.2d at 474.

142. *Id.* at 538, 480 N.W.2d at 473 (quoting *State ex rel. Comstock v. Joint Sch. Dist. No. 1*, 65 Wis. 631, 636-37, 27 N.W. 829, 831 (1886)).

143. *See id.* at 538-39, 480 N.W.2d at 474.

144. 148 Wis. 2d 469, 436 N.W.2d 568 (1989).

145. *Davis*, 166 Wis. 2d at 537, 480 N.W.2d at 473. Section 121.02 of the Wisconsin Statutes lists the standards required of district schools regarding such issues as teacher qualifications, hours of instruction, and curriculum. WIS. STAT. § 121.02 (1989-90).

146. *Davis*, 166 Wis. 2d at 555, 480 N.W.2d at 481 (Abrahamson, J., dissenting). Chief Justice Heffernan expressed his accordance with this dissent. *Id.* (Heffernan, C.J., dissenting).

147. *Id.* at 556, 480 N.W.2d at 481 (Abrahamson, J., dissenting).

legislature already has the authority to create district schools,¹⁴⁸ the justice cited cases holding that article X compels the legislature to use this authority to establish district schools with statewide uniformity and free tuition for children of certain ages.¹⁴⁹ Justice Abrahamson stated:

The legislature could not disband the public school system and pay every student in the state or every private school a sum for education. The state constitution through article X, unlike the federal Constitution, makes an equal opportunity for government-supported education a fundamental right of the student and a fundamental responsibility of state and local government.¹⁵⁰

The justice referred to the rejection of the "patchwork system of diverse schools with mixed public and private funding that existed during the territorial period" during the debate at Wisconsin's constitutional convention.¹⁵¹ Justice Abrahamson concluded that the Wisconsin Constitution prohibits, and case law does not allow, the diversion of "state support for the district schools to a duplicate, competitive private system of schools."¹⁵²

Justice Abrahamson's second reason for finding the MPCP in violation of article X, section 3 was that the "[p]rogram does not ensure that the students who receive basic education through public funding in participating private schools receive an education as nearly uniform as practicable to that received by other students who receive basic education through public funds."¹⁵³ The justice admitted the difficulty of interpreting the Uniformity Clause of article X, section 3 because of its ambiguity and the fact that the constitutional framers did not discuss it.¹⁵⁴ Justice Abrahamson noted that case law has established that article X, section 3 "applies to the districts after they are formed—to the character of the instruction given—rather than to the means by which they are established and their boundaries fixed."¹⁵⁵ The justice used this principle, which was developed in cases involving the boundaries of public school districts, to state that the framers of

148. *Id.* at 556 & n.2, 480 N.W.2d at 481-82 & n.2, (Abrahamson, J. dissenting) (citing *Outagamie County v. Zuehlke*, 165 Wis. 32, 35, 161 N.W. 6, 7 (1917)).

149. *Id.* at 556-57, 480 N.W.2d at 481 (Abrahamson, J., dissenting) (citing *Manitowoc v. Manitowoc Rapids*, 231 Wis. 94, 98, 285 N.W. 403, 404-05 (1939) and *Zweifel v. Joint Dist. No. 1*, 76 Wis. 2d 648, 657, 251 N.W.2d 822, 826 (1977)).

150. *Id.* at 557, 480 N.W.2d at 481 (Abrahamson, J., dissenting) (citing *Kukor v. Grover*, 148 Wis. 2d 469, 488, 436 N.W.2d 568, 576 (1989) and *Buse v. Smith*, 74 Wis. 2d 550, 569, 247 N.W.2d 141, 150 (1976)).

151. *Id.*, 480 N.W.2d at 482 (Abrahamson, J., dissenting).

152. *Id.*

153. *Id.* at 559, 480 N.W.2d at 482 (Abrahamson, J., dissenting).

154. *Id.* at 560, 480 N.W.2d at 483 (Abrahamson, J., dissenting).

155. *Id.* (quoting *Kukor v. Grover*, 148 Wis. 2d 469, 486, 436 N.W.2d 568, 575 (quoting *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 290, 221 N.W. 860, 862 (1928))).

article X, section 3 were not concerned with the structure of the school system that was eventually established.¹⁵⁶ "The majority opinion, however, focuses on the organization of the schools providing the education and not on the character of the education provided in interpreting the term 'district schools.'"¹⁵⁷

Another basis on which to interpret article X, section 3 is the principle that the framers of Wisconsin's 1848 Constitution intended uniform public education to promote participation in the democratic political process and the assimilation of Wisconsin's diverse immigrant population.¹⁵⁸ Justice Abrahamson saw the majority opinion as subversive of these goals of public education, because it permitted public aid to private education absent the same controls that are imposed on public schools. "Article X, sec. 3 requires the legislature to ensure that all Wisconsin children who receive basic education through public funding receive a uniform education reflecting the shared values of our state."¹⁵⁹

D. Analysis

In considering article X, section 3, the majority and the dissent used different analytic approaches to justify their decisions. The majority's instrumentalist analysis considered some of the practical realities of the Milwaukee Parental Choice Program (and ignored others) to uphold what it seemed to believe is worthwhile social legislation.¹⁶⁰ The dissent's formalist approach emphasized an adherence to the principles of the framers of Wisconsin's Constitution over the practical realities of the MPCP to find it in violation of article X, section 3.¹⁶¹

The majority recognized that although the schools remain private, their receipt of public funds subjects them to controls necessary to fulfill the required public purpose.¹⁶² This common sense characterization of the MPCP schools as a hybrid of a private entity receiving public money under public control seems the most reasonable. The sufficiency of these controls is considered in the next section.

156. *Id.*

157. *Id.*

158. *Id.* at 561, 480 N.W.2d at 483 (Abrahamson, J., dissenting) (citing, inter alia, LeRoy, *supra* note 130, at 1325-26, 1345-46).

159. *Id.* at 562, 480 N.W.2d at 483-84 (Abrahamson, J., dissenting).

160. Linda Sharp Paine, *Instrumentalism v. Formalism: Dissolving the Dichotomy*, 1978 WIS. L. REV. 997, 1000.

161. *Id.*

162. *Davis*, 166 Wis. 2d at 539-40, 480 N.W.2d at 474.

The majority recognized that article X, section 3 commands the legislature to provide Wisconsin's children the opportunity to receive a "free uniform basic education."¹⁶³ It also recognized that article X, section 3 does not require the legislature to force children to receive such an education.¹⁶⁴ In any event, the right to attend a private school has been guaranteed since 1925.¹⁶⁵ The majority failed to address, however, whether article X, section 3 compels the legislature to provide a free uniform basic education only within the district, *i.e.*, public schools.

The majority's article X, section 3 analysis did not consider whether the funding for the Milwaukee Parental Choice Program through diversion of state aid from the Milwaukee Public Schools (MPS) to pay private school tuition for MPCP students affects the uniformity of the MPS. The majority stated that "[s]imilar to [legislation distributing state funds to school districts equally on a per pupil basis], the MPCP in no way deprives any student the opportunity to attend a public school with a uniform character of education."¹⁶⁶ In its discussion of the public purpose doctrine, the majority noted that the \$2,500 of state aid diverted from the public schools for each MPCP pupil is less than forty percent of the full cost of educating an MPS student.¹⁶⁷ Because article X, section 3 involves the allocation of only state money, the majority did not note that for each student who leaves the MPS for a private MPCP school, the MPS will save almost \$4,000 in local funds. Because *Davis* was only a facial constitutional challenge, it would not have been appropriate for the court to consider whether the uniformity of the MPS was actually affected.

Because the majority did not find the MPCP schools subject to the uniform "character of instruction" under article X, section 3, it did not address the meaning of a uniform "character of instruction." It merely affirmed the *Kukor v. Grover*¹⁶⁸ holding that the "character of instruction" referring to "district schools" "is legislatively regulated by sec. 121.02, Stats."¹⁶⁹ The court's acceptance of a constitutional standard set by legislation is troubling because it can be changed at the legislature's whim.

Justice Abrahamson's scholarly dissent used the analytic approach prescribed by the Wisconsin Supreme Court for interpreting provisions of the Wisconsin Constitution. This analysis contemplates the words of the provi-

163. *Id.* at 539, 480 N.W.2d at 474.

164. *Id.* at 538-39, 480 N.W.2d at 474.

165. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

166. *Davis*, 166 Wis. 2d at 538, 480 N.W.2d at 474.

167. *Id.* at 545, 480 N.W.2d at 477.

168. 148 Wis. 2d 469, 492, 436 N.W.2d 568, 577 (1989).

169. *Davis*, 166 Wis. 2d at 537, 480 N.W.2d at 473.

sion, the constitutional debates and relevant historical circumstances in existence in 1848, its earliest legislative interpretations, and, as a last resort, the framers' objectives.¹⁷⁰ This principled method of analysis legitimizes a modern court's interpretation of a nineteenth-century constitution. It seems to make constitutional adjudication the unbiased logical application of timeless principles.¹⁷¹ However, such a formalist method can be used to protect the economic and social status quo from progressive legislation.¹⁷²

As Justice Abrahamson admitted, "[i]nterpretation of the uniformity provision is difficult because the language is ambiguous and the framers of the constitution did not discuss this particular clause."¹⁷³ However, the justice found the most convincing argument that the framers intended only the public district schools to be publicly funded in an 1869 Wisconsin Supreme Court case. Citing to that case, which held a law that allowed a town to tax its inhabitants to build a private school unconstitutional under the public purpose doctrine, the concurring justice wrote:

"Our constitution provides for a general system of public free schools And from the general and extensive character of the provisions upon this subject, I think there is some implication that this system was designed to be exclusive, and to furnish the only public instruction which was to be supported by taxation."¹⁷⁴

Justice Abrahamson, unlike the majority, found the fact that the MPCP is funded by state money diverted from the Milwaukee Public Schools supplants rather than augments the public education mandated by article X, section 3.¹⁷⁵

Justice Abrahamson criticized the majority for focusing "on the organization of the schools providing the education and not on the character of the education provided in interpreting the term 'district schools.'"¹⁷⁶ There are two problems with this argument. First, the justice cited cases involving school district boundaries¹⁷⁷ for the proposition that the framers of article X, section 3 were not concerned with the "structure of the school

170. *Id.* at 556, 480 N.W.2d at 481 (Abrahamson, J., dissenting) (citing *State v. Beno*, 116 Wis. 2d 122, 136-38, 341 N.W.2d 668, 675-76 (1984)).

171. See WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 139 (1988).

172. *Id.* at 115.

173. *Davis*, 166 Wis. 2d at 560, 480 N.W.2d at 483 (Abrahamson, J., dissenting).

174. *Id.* at 558 n.5, 480 N.W.2d at 482 n.5 (Abrahamson, J., dissenting) (quoting *Curtis's Adm'r v. Whipple*, 24 Wis. 350, 359-60 (1869) (Paine, J., concurring)).

175. *Id.* at 559, 480 N.W.2d at 482 (Abrahamson, J., dissenting).

176. *Id.* at 556, 480 N.W.2d at 483 (Abrahamson, J., dissenting).

177. *Id.* at 560 n.7, 480 N.W.2d at 483 n.7 (Abrahamson, J., dissenting) (citing *Larson v. State Appeal Bd.*, 56 Wis. 2d 823, 827-28, 202 N.W.2d 920, 922 (1973) and *Joint Sch. Dist. v. Sosalla*, 3 Wis. 2d 410, 420, 88 N.W.2d 357, 363 (1958)).

system established.”¹⁷⁸ However, *Davis v. Grover* is not a dispute over the structure of school district boundaries. Second, the justice misapprehended the nature of the Milwaukee Parental Choice Program and the majority’s discussion of it. As understood by the majority, the MPCP is an experiment in the relationship between school structure (*i.e.*, autonomous private schools subject to less state bureaucracy than public schools) and the character and results of the education it provides.¹⁷⁹

Justice Abrahamson is correct that the framers of the education article of Wisconsin’s Constitution saw public education as a democratizing, assimilating force in their growing state.¹⁸⁰ The framers’ concerns are still valid.¹⁸¹ Justice Abrahamson failed to mention that one of the reasons private schools were disfavored in early Wisconsin was that they were perceived as elite havens of the wealthy.¹⁸² In contrast, the Milwaukee Parental Choice Program applies only to low income children¹⁸³ and is located in Milwaukee, which suffers the greatest educational and other social consequences of poverty.¹⁸⁴ Some research and commentary on school

178. *Id.* at 560, 480 N.W.2d at 483 (Abrahamson, J., dissenting).

179. *Id.* at 531-33, 480 N.W.2d at 470-71.

180. *See, e.g.*, LeRoy, *supra* note 130, at 1325-26, 1345-47. The historical debate over how much the nineteenth-century public school movement was influenced by the desire of America’s dominant Protestant culture to maintain its hegemony in the face of increasing Roman Catholic immigration is beyond the scope of this Note. *See, e.g.*, LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925*, 69-158, 216-17, 220-21(1987); Daniel Patrick Moynihan, *What the Congress Can Do When the Court is Wrong*, in *PRIVATE SCHOOLS AND THE PUBLIC GOOD* 79, 79 (Edward McGlynn Gaffney, Jr. ed. 1981).

181. Also beyond the scope of this Note is the civil libertarian argument that because education necessarily involves the indoctrination of values and beliefs, as does religion, there should be a separation of school and state as there is of church and state. *See* STEPHEN ARONS, *COMPELLING BELIEF* 189-221 (1983).

182. LLOYD P. JORGENSEN, *THE FOUNDING OF PUBLIC EDUCATION IN WISCONSIN 189-90* (1956).

183. To be eligible for the MPCP, a pupil’s family income may not exceed 175% of the federal poverty level. WIS. STAT. § 119.23(2)(a)1 (1989-90).

184. *Davis v. Grover*, 166 Wis. 2d 501, 527-29, 480 N.W.2d 460, 469-70 (1992).

choice has involved poor and minority parents' interest in it¹⁸⁵ and its potential benefits for their children.¹⁸⁶

Which opinion is correct? The majority is correct that the Parental Choice Program schools are private schools rather than public district schools under article X, section 3. As the majority noted, the framers of article X, section 3 intended the legislature to provide at least a minimal opportunity for a free, uniform, basic education. Justice Abrahamson was also correct that the framers wanted to replace territorial Wisconsin's patchwork system of public and private schools. However, it is doubtful that the limited funding (.04% of total public spending on education)¹⁸⁷ and limited enrollment (no more than 1% of Milwaukee's school children) of the MPCP poses a threat to the "uniformity" of publicly funded education in Wisconsin, whether by draining money from public schools or by supporting differently regulated schools.

V. DOES THE PUBLIC FUNDING OF PRIVATE SCHOOL EDUCATION VIOLATE THE PUBLIC PURPOSE DOCTRINE?

A. *The Public Purpose Doctrine*

The final challenge to the Milwaukee Parental Choice Program was that it violated Wisconsin's implicit constitutional public purpose doctrine. This judicial doctrine constitutionalizes the political ethic that "governmental power should be used for the benefit of the entire community."¹⁸⁸ That is, public money must be spent for public purposes. Its first appearance in Wisconsin case law was in *Soens v. Racine*.¹⁸⁹

The Wisconsin Supreme Court outlined the modern public purpose doctrine in *State ex rel. Warren v. Reuter*.¹⁹⁰ "[W]hat constitutes a public purpose is in the first instance a question for the legislature to determine and its

185. Priscilla Ahlgren, *Why Poor Parents Like the Program's Options*, MILWAUKEE J., Nov. 21, 1991, at A1; see also KIRKPATRICK, *supra* note 1, at 144, 151 (citing two Gallup polls (1983 & 1986) showing minority support for tuition voucher plans); Schneider, *Schooling for Poor and Minority Children*, in PRIVATE SCHOOLS AND PUBLIC POLICY 73, 84 (Boyd & Cibulka ed. 1989) (The reasons poor and minority parents have chosen private schools include: greater emphasis on reading, writing, and math; positive social development; higher expectations of the students; the opportunity to communicate with more accessible private school teachers; the opportunity for parental involvement; and the educational philosophy of private schools).

186. KIRKPATRICK, *supra* note 1, at 89, 111 (citing economists Thomas Sowell and Milton Friedman, who support public voucher aid for private school tuition); see also Rotunda, *supra* note 7, at 930 n.77 (discussing successful private schools serving African-American pupils).

187. Davis, 166 Wis. 2d at 546, 480 N.W.2d at 477.

188. Lewis R. Mills, *The Public Purpose Doctrine in Wisconsin*, 1957 WIS. L. REV. 40, 40.

189. 10 Wis. 271 (1860).

190. 44 Wis. 2d 201, 170 N.W.2d 790 (1969).

opinion should be given great weight.”¹⁹¹ The legitimate purposes for which public money may be spent change over time as societal expectations of government change.¹⁹²

A private entity may be used to accomplish a public purpose as long as it is “under reasonable regulations for control and accountability to secure public interests.”¹⁹³ The reasonableness of a regulation is a matter “of degree and depends upon the purposes, the agency and the surrounding circumstances. Only such control and accountability as is reasonably necessary under the circumstances to attain the public purpose is required. Budgeting and auditing are, of course, basic and necessary controls; additional types of control vary”¹⁹⁴ For example, the court noted that an 1867 appropriation of public money to build a private school building was found unconstitutional in *Curtis’s Administrator v. Whipple*¹⁹⁵ partly because the taxpayers lacked control or supervision through audits or participation in management.¹⁹⁶

B. The Majority Opinion

After summarizing the public purpose doctrine, the majority noted: “No party disputes that education constitutes a valid public purpose, nor that private schools may be employed to further that purpose.”¹⁹⁷ The court then addressed whether the private MPCP schools were under “proper government control and supervision.”¹⁹⁸ The majority compared the present situation to that in *Reuter*.¹⁹⁹ First, the state appropriation to the Marquette School of Medicine was earmarked for “medical education, teaching and research,” while section 119.23 does not have express requirements for the Milwaukee Parental Choice Program private schools.²⁰⁰ However, the majority found that these schools are required to provide education complying with the statutory requirements for private schools.²⁰¹

191. *Id.* at 212, 170 N.W.2d at 794.

192. *Id.* at 213, 170 N.W.2d at 795.

193. *Id.* at 216, 170 N.W.2d at 796 (quoting *Wisconsin Indus. Sch. v. Clark County*, 103 Wis. 651, 667, 79 N.W. 422, 427 (1899)).

194. *Id.*

195. 24 Wis. 350 (1869).

196. *Id.* (citing *Curtis’s Adm’r v. Whipple*, 24 Wis. 350 (1869)).

197. *Davis v. Grover*, 166 Wis. 2d 501, 541, 480 N.W.2d 460, 475 (1992).

198. *Id.* (citing *Wisconsin Indus. School v. Clark County*, 103 Wis. 651, 667, 79 N.W. 422, 427 (1899)); *see also* *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 215, 170 N.W.2d 790, 796 (1969).

199. *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 170 N.W.2d 790 (1969).

200. *Davis*, 166 Wis. 2d at 542, 480 N.W.2d at 475.

201. *Id.* at 542-43, 480 N.W. 2d at 475.

Similarly, the use of only some state aid to public schools is statutorily limited.²⁰²

Second, the court addressed the challenge that while the medical school was "accredited by an independent national organization as well as federal and state agencies,"²⁰³ the MPCP private schools are not required to prove the quality of the education they provide.²⁰⁴ Section 119.23(2)(a) applies the MPCP to "nonsectarian private schools." The court listed the statutory requirements for private schools:

Under sec. 118.165, Stats., a private school must:

- (1) be organized to primarily provide private or religious-based education;
- (2) be privately controlled;
- (3) provide at least 875 hours of instruction each school year;
- (4) provide a sequentially progressive curriculum of fundamental instructions in reading, language arts, mathematics, social studies, science, and health;
- (5) not be operated or instituted for the purpose of avoiding or circumventing compulsory school attendance; and
- (6) have pupils return home not less than two months of each year unless the institution is also licensed as a child welfare agency.²⁰⁵

The majority listed some of the controls on the MPCP: the State Superintendent of Public Instruction must annually report to the legislature comparing MPCP and MPS students regarding academic achievement, daily attendance, and percentages of pupils dropping out, suspended, or expelled;²⁰⁶ and the Superintendent "may" and the Legislative Audit Bureau "shall" conduct financial and performance audits of the MPCP.²⁰⁷ The majority also found that because the MPCP gave eligible parents the opportunity to move their children to the participating school which they felt met their needs, "parental choice preserves accountability for the best interests of the children."²⁰⁸ Thus, the majority found the private MPCP Schools were under the control of both state statute and parental choice.

The majority cited dicta in *Wisconsin v. Yoder*²⁰⁹ in which the United States Supreme Court "declared that purely secular considerations 'may not

202. *Id.* at 542, 480 N.W. 2d at 475.

203. *Id.* (citing *State ex rel. Warren v. Reuter*, 44 Wis. 2d, 201, 217, 170 N.W.2d, 790, 797 (1969)).

204. *Id.*

205. *Id.* at 543, 480 N.W.2d at 475.

206. *Id.* at 543, 480 N.W.2d at 476; see WIS. STAT. § 119.23(5)(d) (1989-90).

207. *Id.* at 544, 480 N.W.2d at 476; see WIS. STAT. § 119.23(9)(a) & (b) (1989-90).

208. *Id.*

209. 406 U.S. 205 (1972).

be interposed as a barrier to *reasonable state regulation* of education.’”²¹⁰ The majority was satisfied that because the premise of the MPCP is that “less bureaucracy coupled with parental choice improves educational quality,”²¹¹ the MPCP’s reporting and private school requirements for participating private schools (which are more liberal than the statutory requirements for public schools) “provide sufficient and reasonable state control under the circumstances.”²¹²

Finally, the majority noted that the controls on the MPCP were sufficient and reasonable because the amount of money allocated to the MPCP depends on tax funding of public education²¹³ and is relatively inconsequential. The \$2,500 of state aid to educate each MPCP student is less than forty percent of the \$6,451 average cost of educating a Milwaukee Public School pupil.²¹⁴ At most, \$2.5 million of tax money (approximately .04% of the over \$6.4 billion annually spent on public education in Wisconsin) will be appropriated to the MPCP.²¹⁵

C. Analysis

A consideration of whether the *Davis* court adequately applied the public purpose doctrine turns upon two questions: Is the private education of low income children a proper purpose for the expenditure of public money, and does the Milwaukee Parental Choice Program contain sufficient controls and supervision to ensure that the public purpose is met?

The majority did not mention the concurrence in *Whipple* which suggested that the Wisconsin Constitution’s general and extensive provisions regarding public education indicate that a privately established and controlled school is a private object that cannot be supported by tax money.²¹⁶ However, as the Wisconsin Supreme Court has stated, “what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today”²¹⁷

210. *Davis*, 166 Wis. 2d at 545, 480 N.W.2d at 476 (emphasis added) (citing *Yoder*, 406 U.S. 205, 215).

211. *Id.* at 543, 480 N.W.2d at 476.

212. *Id.* at 545, 480 N.W.2d at 476.

213. *Id.*

214. *Id.* at 545-46, 480 N.W.2d at 476-77.

215. *Id.*

216. *Curtis’s Adm’r v. Whipple*, 24 Wis. 350, 360 (1869); see also Lewis R. Mills, *The Public Purpose Doctrine in Wisconsin Part II: The Application of the Doctrine By The Wisconsin Supreme Court*, 1957 WIS. L. REV. 282, 291.

217. *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 213, 170 N.W.2d 790, 795 (1969) (quoting *State ex rel. Wisconsin Dev. Auth. v. Dammann*, 228 Wis. 147, 182, 280 N.W. 698, 709 (1938)).

The *Davis* majority did not address all of the statutory controls imposed by the Milwaukee Parental Choice Program on participating private schools. Section 119.23(7)(a) provides that each school shall meet at least one of four criteria:

1. At least 70% of the pupils in the program advance one grade level each year.
2. The private school's average attendance rate for the pupils in the program is at least 90%.
3. At least 80% of the pupils in the program demonstrate significant academic progress.
4. At least 70% of the families of pupils in the program meet parent involvement criteria established by the private school.²¹⁸

However, except for the attendance rate, each school can subjectively decide whether it has satisfied a criterion. Perhaps that is why the court did not address these criteria as "controls." MPCP schools may not discriminate on the basis of race, color, or national origin.²¹⁹

The majority compared the MPCP to the state aid given to the Marquette School of Medicine, which was upheld in *Reuter*,²²⁰ but did not note the differences. *Reuter* did not involve the basic education of pupils between the ages of four and twenty. Moreover, not only was the Marquette School of Medicine's budget audited (as are the budgets of the MPCP schools), but also the state had a one-third representation on the medical school's board of directors.²²¹ The majority stated the "underlying thesis" of the MPCP to be "that less bureaucracy coupled with parental choice improves educational quality."²²² Section 119.23 states neither this premise nor any other public purpose. The Wisconsin Supreme Court has held that a legislative declaration of a statute's public purpose is not determinative but can be helpful if supported by the facts.²²³

Parental choice proponents argue that autonomy from bureaucratic control is the most important factor in a school's educational effectiveness.²²⁴ Choice schools would be held accountable for the quality of their education "from below, by parents and students who directly experience

218. WIS. STAT. § 119.23(7)(a) (1989-90).

219. Section 119.23(2)(a)4 of the Wisconsin Statutes applies 42 U.S.C. § 2000d to the MPCP. WIS. STAT. § 119.23(2)(a)4 (1989-90). Private schools must meet "all health and safety laws or codes that apply to public schools." WIS. STAT. § 119.23(2)(a)5 (1989-90).

220. *Davis v. Grover*, 166 Wis. 2d 501, 541-42, 480 N.W.2d 460, 475 (1992).

221. *State ex rel. Warren v. Reuter*, 44 Wis. 2d at 217, 170 N.W.2d at 796 (1969).

222. *Davis*, 166 Wis. 2d at 543, 480 N.W.2d at 476.

223. *Reuter*, 44 Wis. 2d at 212, 170 N.W.2d at 794.

224. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 183 (1990).

their services and are free to choose.”²²⁵ The existence of alternative schools providing publicly-funded education would force public schools to improve to compete for students.²²⁶

Regardless of whether the proponents or the opponents of parental choice are ultimately correct, *Davis v. Grover*²²⁷ is not the Wisconsin Supreme Court’s first recognition that parents are “the persons under natural conditions having the most effective motives and inclinations and being in the best position and under the strongest obligation to give to such children proper nurture, education and training.”²²⁸

Was the majority correct in finding sufficient control and supervision over the private schools paid to educate the children participating in the MPCP? The *Reuter* court set a liberal standard:

A private agency cannot and should not be controlled as two-fistedly as a governmental agency. If such need for control is present, it might be better to use a governmental agency. A private agency is selected to aid the government because it can perform the service as well or better than the government. We should not bog down private agencies with unnecessary governmental control.²²⁹

Finally, it is interesting to compare the relative degree of control and supervision of the MPCP schools and the public schools. Failure to meet at least one of the four performance criteria imposed on the MPCP schools will make them ineligible to participate in the program the following year.²³⁰ The weaknesses of these criteria were discussed above. Public schools are subject to statutory and regulatory standards in order to receive state aid.²³¹ However, they are not required to prove compliance.²³² The State Superintendent of Public Instruction has sole discretion to withhold state aid in order to enforce the requirements.²³³ The superintendent is not

225. *Id.* at 225.

226. Newman, *supra* note 1, at 179. Supporters of school choice also argue that it would promote pluralism in education, because more students could afford to attend private schools beyond their public school district boundaries that segregate by socio-economic status and race. Debate Transcript, *The Merits or Demerits of the Public Funding of Private Education*, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y 453, 458-59 (1985) (Lawrence Uzzell, President of LEARN, Inc., of Washington, D.C.). However, Wisconsin limits the Parental Choice Program to students and schools within the same first class city. WIS. STAT. § 119.23(2)(a) (1989-90).

227. 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

228. Wisconsin Indus. Sch. v. Clark County, 103 Wis. 651, 668-69, 79 N.W. 422, 428 (1899).

229. State *ex rel.* Warren v. Reuter, 44 Wis. 2d 201, 217, 170 N.W.2d 790, 797 (1969).

230. WIS. STAT. § 119.23(7)(b) (1989-90).

231. Mark Hazelbaker & David C. Hertel, *Privatization and the “Primarily Related” Test: A Case for Clarification*, 74 MARQ. L. REV. 451, 453 (1991).

232. *Id.*

233. *Id.*

required to withhold state aid if a public school does not meet state standards, and in fact has never done so.²³⁴

VI. CONCLUSION

The Milwaukee Parental Choice Program²³⁵ is America's first experiment with using public funds to educate low income children in nonsectarian private schools chosen by their parents. It will not be the last. Its affirmation will encourage similar programs elsewhere. President Bush advocated parental choice as part of his "America 2000" school reform plan.²³⁶ "The Parental Choice in Education Initiative, which would expand choice in the public schools and provide vouchers starting at about \$2,500 per student for children who attend private schools" has been proposed in California.²³⁷

Wisconsin's experience with this controversial policy foreshadows what will happen wherever it is proposed. The litigants will be similar. The proponents will be parents seeking public aid to subsidize the exercise of their constitutional right to educate their children in private schools²³⁸ instead of in public schools that they already fund with their taxes. Parental choice has long been opposed by powerful teacher unions,²³⁹ such as the National Education Association and the American Federation of Teachers, who fear any threat to the near monopoly that public schools have on American elementary and secondary education.²⁴⁰ The battle over parental choice is essentially an example of the classic economic problem of organized

234. *Id.* at 453-54 & n.14.

235. WIS. STAT. § 119.23 (1989-90).

236. Ahlgren, *supra* note 185, at A1; see *Bush Puts Wisconsin Choice Plan in Spotlight*, MILWAUKEE J., June 25, 1992, at A3. President Bush has proposed a \$500 million federal program providing tuition vouchers for below median income families to use at public or private (nonsectarian and parochial) schools. Passage of this controversial proposal is unlikely. *Bush Puts Wisconsin Choice Plan in Spotlight*, *supra* at A3.

237. Debra J. Saunders, *School Choice Makes Educator Lobbies Quiver*, MILWAUKEE J., Feb. 10, 1992, at A9.

238. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). The United States Supreme Court has asserted that the lack of public funding for private education does not violate the Equal Protection Clause of the Fourteenth Amendment. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973). Likewise it does not violate the Due Process Clause. *Harris v. McRae*, 448 U.S. 297, 318 (1979).

239. Stephen D. Sugarman & John E. Coons, *How to End the Public School Monopoly*, BUS. & SOC'Y REV. 29, 29 (Fall, 1980); see also, e.g., Hazelbaker & Hertel, *supra* note 231, at 476 n.75. The Wisconsin Education Association Council (WEAC), one of the litigants opposing the MPCP, is a good example. In 1987-88, WEAC's Political Action Committee contributed \$640,832.82 to state candidates. This amount is over three times as much as the second largest amount of contributions and more than all of the other top eight contributors combined.

240. KIRKPATRICK, *supra* note 1, at 77-87; see also Saunders, *supra* note 237.

producers seeking to maintain their control of the market at the expense of their unorganized consumers.

As in *Davis v. Grover*,²⁴¹ this struggle will focus upon the education articles of state constitutions and will be couched in terms of educational quality, the democratizing role of public schools, and the proper purpose for the expenditure of public money. These provisions vary widely, from merely pronouncing the importance of education to mandating free public school systems.²⁴² Proponents and opponents of public aid to parents for the purpose of paying private school tuition may wish to amend state constitutions written in the nineteenth century to explicitly address this contemporary issue.

The challenge of a program of state funding of private school tuition was a case of first impression in Wisconsin, as it will be elsewhere. The *Davis* majority found that despite their receipt of public funds, the schools in the MPCP remain private. Therefore, they are subject to neither article X, section 3 of the Wisconsin Constitution that requires the legislature to establish free, uniform, district schools for elementary and secondary age students nor to the statutory requirements placed on public schools. The dissent drew upon limited precedent to argue that the framers of Wisconsin's Constitution intended the public schools to be the only ones financed by taxation. The majority accepted the premise that parental choice can serve the public purpose of providing quality education.

The theory of parental choice is that funding education is a public responsibility, but that it can be provided most effectively in schools autonomous from bureaucratic control. The schools in a parental choice program are accountable to parents who can purchase educational services elsewhere in the marketplace. Market-driven competition is presumed to spur improvement in educational quality by all schools. The question of whether public aid giving low income parents the choice to educate their children in private schools improves education in America or affects the democratizing role of public education will be answered in part by the results of the Milwaukee Parental Choice Program.

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241. 166 Wis. 2d 501, 480 N.W.2d 460 (1992).

242. Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517, 532-33 & n.54 (1991).